

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 14, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dollys Pizza Franchising, Inc.

Serial No. 75/103,182

Douglas J. McEvoy of Gifford, Krass, Groh, Sprinkle,
Patmore, Anderson & Citkowski, P.C. for Dollys Pizza
Franchising, Inc.

Zhaleh Sybil Delaney, Trademark Examining Attorney, Law
Office 101 (Jerry Price, Managing Attorney)

Before Simms, Seeherman, and Holtzman, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Dollys Pizza Franchising, Inc. has appealed from the
refusal of the Trademark Examining Attorney to register
DOLLYS PIZZA and design, as shown below, for pizzas for
consumption on or off the premises.¹ Applicant has

¹ Application Serial NO. 75/103,182, filed May 13, 1996,
asserting first use and first use in commerce on April 1, 1991.

Ser. No. 75/103,182

disclaimed exclusive rights to use the word PIZZA apart from the mark as shown.

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark DOLLY'S and design, shown below, registered for restaurant services,² that, as used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed appeal briefs. An oral hearing was not requested.

We affirm the refusal of registration.

² Registration No. 1,317,386, issued January 29, 1985; Section 8 affidavit accepted; Section 15 affidavit received.

Our determination is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. **Federated Food, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods and services, applicant's goods are identified as pizza sold for consumption on or off the premises, in other words, cooked pizza sold at the place where it is prepared. Applicant attempts to distinguish its facilities from those of the registrant by describing its premises as a pizzeria, and the registrant's as a "traditional restaurant" that does not sell pizza. However, applicant's identification could include pizza made at a restaurant, not just at a pizzeria and, indeed, applicant's specimens indicate that, in addition to pizza, it sells such restaurant items as pasta, salads and sandwiches. Further, although applicant describes the registrant's services as a traditional restaurant, the identification in the cited registration is for "restaurant services," without any limitation as to the type of restaurant. Thus, the registrant's identified restaurant

services must be deemed to include restaurants which feature pizza. Moreover, restaurants specializing in various cuisines may offer pizzas on their menus.

In addition, the Examining Attorney has made of record a large number of third-party registrations showing that a single entity has registered the same mark for both pizza and for restaurant services. Third-party registrations which individually cover a number of different items and which are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

Accordingly, the Examining Attorney has demonstrated that pizza for consumption on or off the premises, and restaurant services, are sufficiently related that, if a confusingly similar mark were used for both, consumers are likely to believe that the goods and services emanate from the same source.

With respect to the marks, it is well established that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a

mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. **In re In re National Data Corp.**, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In this case, the verbal portions of both marks are virtually identical. Although applicant's mark includes the word PIZZA, this word, which is the generic term for applicant's goods, has no source-identifying function. Applicant points out that the wording in the marks appears in different type styles, and that the marks have different pictorial elements, with applicant's mark depicting a girl in a toque holding a slice of pizza, and the cited mark having a background design reminiscent of a leaded-glass window. However, these differences are not sufficient to distinguish the marks in such a way as to avoid likelihood of confusion. In the marketplace, consumers do not have the luxury of making side-by-side comparisons, but must rely upon past recollections, which are usually hazy. See **Dassler KG v. Roller Derby Skate Corporation**, 206 USPQ 255 (TTAB 1980). In the case of these marks, for these goods and services, it is the verbal portions of the marks that are most likely to be noticed and remembered. As the Board stated in **In re Appetito Provisions Co., Inc.**, 3 USPQ2d 1553, 1554 (TTAB 1987),

quoted at some length by the Examining Attorney in her brief:

... a particular feature or portion of a mark can thus be accorded greater weight if it would make an impression upon purchasers that would be remembered and relied upon to identify the goods or services. Thus, if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. The principle is especially important in cases involving restaurant services in view of the propensity of persons to try restaurants based on word-of-mouth recommendations. (citations omitted).

Applicant's reliance on **In re Electrolyte Laboratories Inc.**, 929 F.2d 645, 16 USPQ2d 1239 (Fed. Cir. 1990) and **Hewlett-Packard Co. v. Human Performance Measurement Inc.**, 23 USPQ2d 1390 (TTAB 1991), is misplaced. Those cases involved letter-plus-design marks, not word and design marks, as we have here. (See, for example, the following statement in Electrolyte at p. 1240: "The nature of stylized letter marks is that they partake of both visual and oral indicia, and both must be weighed in the context in which they occur.")

We also point out that, based on the record before us, we must consider DOLLY'S to be a strong mark. Although applicant makes the general statement that it is aware of

other registered and pending DOLLY marks, it has not made any such third-party registrations of record. Because there is no evidence of third-party use or registration of DOLLY marks, even if consumers do note the differences in the design elements, they are likely to consider that the marks are variations of each other, rather than to believe that the marks indicate different sources of origin of the goods and services.

Applicant argues that it is unaware of any instances of actual confusion although it has used its mark since 1991, and previously used the mark for DOLLY'S PIZZA PALS! beginning in 1982. However, applicant also has stated that its pizzerias are located in Michigan, and that it believes that registrant's restaurants are located in South Carolina and the immediate surrounding area. To the extent that applicant sells its goods, and the registrant renders its services, in separate geographic areas, that may explain why applicant is not aware of any instances of actual confusion. However, neither applicant's application nor the cited registration is geographically restricted, so we must consider the likelihood of confusion if the goods and services were to be offered in the same area. For the reasons indicated above, we find that in such circumstances confusion would be likely to occur.

Ser. No. 75/103,182

Decision: The refusal of registration is affirmed.

R. L. Simms

E. J. Seeherman

T. E. Holtzman
Administrative Trademark Judges
Trademark Trial and Appeal Board